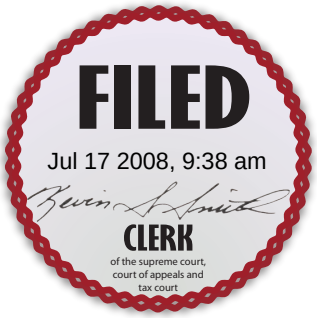

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IN THE
COURT OF APPEALS OF INDIANA

SHONEY'S, INC. and SHN PROPERTIES, LLC, Individually and as Assignees of MIRIAM HEDRICK and the ESTATE OF DONALD E. HEDRICK,	)	
Appellants,	)	
vs.	)	No. 49A02-0708-CV-747
MID-AMERICAN FIRE & CASUALTY COMPANY,	)	
Appellee.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Michael D. Keele, Judge
Cause No. 49F12-0204-CT-1373

July 17, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Shoney's, Inc. and SHN Properties, as assignees of Miriam Hedrick and the Estate of Donald E. Hedrick (collectively "Shoney's"), appeal from the trial court's order granting the motion for partial summary judgment filed by Mid-American Fire & Casualty ("Mid-American") on the claims alleging bad faith and waiver and estoppel in the amended third party complaint filed by Shoney's. On appeal, we address the following issues:

1. Whether the trial court erred when it granted Mid-American's partial summary judgment motion on the bad faith claim.

2. Whether the trial court erred when it granted Mid-American's partial summary judgment motion on the waiver and estoppel claim.

We affirm.[1]

FACTS AND PROCEDURAL HISTORY

The relevant facts are set forth in large part in our prior memorandum decision, Mid-American Fire & Casualty, Co. v. Shoney's, Inc., No. 49A02-0503-CV-235 (Ind. Ct. App. October 5, 2005) ("Mid-American I"), aff'd on other grounds on reh'g, 843 N.E.2d 548 (Ind. Ct. App. 2006), trans. denied ("Mid-American II"):

I. Background

> The relevant facts are undisputed. On April 12, 1985, Hedrick and Philip B. Schwab ("Schwab") purchased certain real property located at 5010 South East Street in Indianapolis, Indiana, on which a gasoline service station with three underground storage tanks ("UST's") had been operated (hereinafter referred to as the "Property").[] . . . On or about November 12, 1985,[] Hedrick [as Lessor] and Shoney's executed a lease on the Property

[1] Because we hold that the trial court did not err when it granted partial summary judgment to Mid-American, we need not address Mid-American's claim on cross-appeal that the trial court abused its discretion when it denied Mid-American's motion to strike the affidavit of Olie Jolstad, which was designated by Shoney's in its opposition to partial summary judgment.

(the "Lease"). Pursuant to the Lease, [the] Lessor, was responsible for "remov[ing] the existing building and gasoline tanks," and Shoney's, as Lessee, was responsible for determining "if the soil substrate of the premises are satisfactory . . . for the construction of a restaurant or such other improvement which Lessee may intend to construct on the premises." The Lease also required Shoney's to maintain insurance on the premises and, in addition, gave Shoney's an option to purchase the premises.

In December of 1986, Hedrick and Schwab, as tenants in common, conveyed the Property to [First American Investment Trust, Inc. ("FAIT")] for the sum of ten dollars and other valuable consideration. On December 18, 1986, FAIT, in turn, conveyed the Property to Shoney's, via a corporate warranty deed. At the time of the sale, Hedrick represented to [Shoney's] "that the tanks in question had been properly 'pulled' or 'closed.'" Id. at 634. On November 21, 1997, Shoney's conveyed the Property to SHN Properties.

From July 20, 1987 to August 30, 1998, Shoney's operated a restaurant on the Property. When Shoney's attempted to sell the Property, an investigation of the site revealed petroleum contamination in the soil and groundwater. On June 19, 2002, [Shoney's] filed an amended complaint against several defendants, including the Estate of Hedrick ("Estate"),[] alleging that the contamination to the Property was caused by the prior owners or operators' operation of the UST's, and seeking remediation costs, attorney fees, and other damages.[]

II. Mid-American's Insurance Policy

On September 11, 2002, the Estate notified Mid-American, from which Hedrick had purchased a homeowner's insurance policy ("Homeowner's Policy" or "Policy"), of the pending litigation. . . .

III. Mid-American's Discussions with Hedrick Regarding the Underlying Litigation

On September 22, 2002, the Estate sent Mid-American a second correspondence wherein it demanded that the insurance company defend the Estate against [Shoney's] allegations of liability. On October 22, 2002, Mid-American, via Thomas J. Baker ("Baker") of Liberty Regional Agency Markets, sent a correspondence to the Estate, explaining that it was in the process of investigating whether Hedrick's Homeowner's Policy provided coverage for the alleged soil contamination. In that letter, Baker requested that the Estate direct all further correspondence "related to this matter" to him. Thereafter, on November 26, 2002, the Estate sent Mid-American a

letter—care of Doug Jenkins—regarding potential settlement negotiations with [Shoney's].

On January 8, 2003, Baker sent the Estate a letter informing it that: (1) Mid-American had "serious questions as to whether coverage applies for this matter;" (2) the insurance company would continue to investigate the coverage further; and (3) during the investigation—which would be conducted "under a full reservation of rights"—Mid-American will not defend the Estate in the pending litigation with [Shoney's]. In response, the Estate's attorney advised Baker that the Estate rejected Mid-American's "reservation of rights which appears to have been asserted in [the] January 8, 2003 letter," and requested that Mid-American take part in settlement discussions with [Shoney's], on behalf of the Estate. Subsequently, Baker and the Estate exchanged multiple correspondences to aid in Mid-American's investigation of the Estate's claim.

IV. The Agreed Judgment Between [Shoney's] and the Estate

On or about February 26, 2003, [Shoney's] and the Estate executed an agreed judgment, wherein the Estate agreed that it was liable to [Shoney's] in the amount of $500,000.00 and [Shoney's] agreed to forego execution on the judgment, "except to the extent there is coverage to pay this judgment under Hedrick's policies of liability insurance, including the policy or policies of Mid-American." While the agreed judgment speaks in terms of "policy or policies," the Estate was "unaware of any other policies of insurance that provided liability insurance to Hedrick in the 1983 to 1987 time frame other than the Mid-American policy." Pursuant to the agreed judgment, the Estate agreed to assign its rights in the Mid-American policy to [Shoney's].

On March 14, 2003, the trial court accepted an agreed judgment between the Estate and [Shoney's], and granted summary judgment to [Shoney's] in the amount of $500,000.00, plus interest. In so doing, the trial court noted that "[t]he Estate has no assets that could be used to pay a judgment against it, other than a policy of liability insurance. This policy has limits of $500,000, but the insurer has refused to defend or indemnify the Estate."

V. The Third-Party Complaint

On March 25, 2003, [Shoney's]—as assignees of the Estate—filed a third-party complaint against Mid-American, alleging, in part, bad faith and breach of contract. On May 22, 2003, Mid-American moved to vacate the agreed order and judgment or, in the alternative, to seek relief from such

> order. On May 29, 2003, Mid-American filed an answer to the third-party complaint, asserting that it "had no duty to defend or indemnify the Estate because at a minimum its policy unambiguously barred coverage for property damage arising out of business pursuits or the rental or holding for rental of property and a premises that is not an insured location."
>
> On August 20, 2004, [Shoney's] filed a partial motion for summary judgment on all issues concerning Mid-American's duty to defend. In response, Mid-American filed a cross-motion for summary judgment, arguing that the Policy does not cover the Property in question and requesting a declaration that it had no duty to defend or indemnify the Estate. On February 17, 2005, the trial court granted [the] partial motion for summary judgment [filed by Shoney's] and denied Mid-American's cross-motion for summary judgment. . . .

Mid-American I, slip op. at *3-*10 (citations to the record omitted).

Mid-American appealed, and this court reversed, holding that Mid-American did not owe a duty to defend or a duty to indemnify. Mid-American I, slip op. at *18-*19. The court directed the trial court to grant partial summary judgment to Mid-American. Id. On rehearing, this court affirmed its prior decision on a different ground, namely, that the claim was based on damages accrued through the insured's business pursuits, which were excluded from the homeowner's policy. Mid-American II, 843 N.E.2d at 552.

In November 2006, Mid-American filed a motion for partial summary judgment on the bad faith and waiver and estoppel claims. Shoney's filed its opposition to the motion, brief in opposition, and designation of evidence, including the report of its expert, Olie Jolstad. Mid-American moved to strike Jolstad's testimony as inadmissible. After briefing, the trial court denied the motion to strike but granted partial summary judgment in favor of Mid-American. In its order, the trial court found that there was no just reason for delay. Shoney's now appeals.

DISCUSSION AND DECISION

Standard of Review

When reviewing the propriety of a ruling on a motion for summary judgment, this court applies the same standard as the trial court. Sees v. Bank One, Ind., N.A., 839 N.E.2d 154, 160 (Ind. 2005). A party seeking summary judgment must show that "'there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Id. (quoting Ind. Trial Rule 56(C)). The review of a summary judgment motion is limited to those materials designated to the trial court. Id. See T.R. 56(H). A trial court's grant of summary judgment is "clothed with a presumption of validity," Rosi v. Bus. Furniture Corp., 615 N.E.2d 431, 434 (Ind. 1993) (citation omitted), and we will affirm the trial court's grant of summary judgment on any theory or basis found in the record, Rodriguez v. Tech Credit Union Corp., 824 N.E.2d 442, 446 (Ind. Ct. App. 2005).

Issue One: Bad Faith

Shoney's contends that the trial court erred when it granted partial summary judgment in favor of Mid-American. Specifically, Shoney's asserts that it demonstrated genuine issues of material fact as to whether Mid-American breached its duty of good faith and fair dealing by its "intentional mishandling of the Estate's claim, deceptive statements, [and] conscious decision to place its own interests over those of its insured." Appellant's Brief at 20. Thus, Shoney's maintains, summary judgment was improper. We cannot agree.

Our supreme court has described an insurer's duty of good faith to its insured as follows:

> Insurers have a duty to deal in good faith with their insureds. . . . A good faith dispute concerning insurance coverage cannot provide the basis for a claim in tort that the insurer breached its duty to deal in good faith with its insured. And "this is so even if it is ultimately determined that the insurer breached its contract. That insurance companies may, in good faith, dispute claims, has long been the rule in Indiana." . . . But an insurer's duty to deal in good faith with its insured encompasses more than a bad faith coverage claim. . . .
>
> In [Erie Insurance Co. v. Hickman, 622 N.E.2d 515 (Ind. 1993),] we specifically declined to determine the precise extent of an insurer's duty to deal in good faith. Instead, we made a few general observations as follows:
>
> > The obligation of good faith and fair dealing with respect to the discharge of the insurer's contractual obligation includes the obligation to refrain from (1) making an unfounded refusal to pay policy proceeds; (2) causing an unfounded delay in making payment; (3) deceiving the insured; and (4) exercising any unfair advantage to pressure an insured into a settlement of his claim.

Monroe Guar. Ins. Co. v. Magwerks, Corp., 829 N.E.2d 968, 975-76 (Ind. 2005) (quoting Hickman, 622 N.E.2d at 519) (internal citations omitted). However, the court in Magwerks declined to address whether the duty to deal in good faith also includes the manner of handling the claim.[2] Id. at 976. Still the list in Hickman is not exhaustive and, therefore, an insured may demonstrate bad faith in ways not listed in Hickman.

---

[2] Another panel of this court has observed:

> an insurer may breach the covenant of good faith and fair dealing in ways other than a wrongful denial of coverage; hence, an insurer may exhibit bad faith in, for example, its handling of the claim such that even if it engages in a good faith dispute over coverage it may still breach the covenant of good faith and fair dealing.

Hemocleanse, Inc. v. Philadelphia Indem. Ins. Co., 831 N.E.2d 259, 264 n.2 (Ind. Ct. App. 2005) (citing Magwerks, 829 N.E.2d at 977). But Magwerks does not establish indisputably that a claim may lie for bad faith in the handling of a claim. Instead, the insured in Magwerks raised that issue but did "not

In opposition to Mid-American's partial summary judgment motion, Shoney's argues that Mid-American's

> conscious disregard for the plight of its insured, its failure to communicate openly and honestly with its insured about the nature of its investigation, and its failure to timely disclaim coverage, defend, or file a declaratory action indicate that the way in which Mid-American went about deciding whether it had a duty to defend was its first mistake.

Appellant's Brief at 21 (emphasis original). Shoney's also contends that an "investigation conducted in an intentionally half-hearted manner can raise a factual issue as to whether an insurer acted in good faith." Id.

Shoney's urges this court to expand upon Hickman to include the manner of handling an insurance claim as another type of actionable bad faith conduct. Although neither Hickman nor cases following it would preclude such a step, the claims in this appeal can be adequately addressed within the four types of actionable bad faith listed in Hickman. Thus, we opt not to expand Hickman in this case and leave for another day the question of whether the manner of handling an insurance claim can constitute a distinct type of actionable bad faith.

Expert Report

On appeal, Shoney's first relies on the report of its expert, Olie Jolstad, to create a genuine issue of material fact as to whether Mid-American dealt in bad faith by:

> (1) contesting the validity and existence of the Policy without any legitimate basis for doing so;
>
> (2) falsely representing its inability to locate an exemplar of the Policy terms;

---

provide[] much guidance[,]" so the court "declined to expand on the extent of the duty an insurer owes to its in[s]ured beyond those [the court had] already expressed in Hickman." Magwerks, 829 N.E.2d at 976.

(3) declining to defend without an express disclaimer or any legitimate basis for doing so contrary to industry custom and practice;

(4) prematurely making a coverage determination and failing to communicate that to its insured;

(5) consciously ignoring the financial exposure faced by its insured as evidenced by its refusal to participate in settlement negotiations or otherwise take steps to protect its insured in ongoing litigation;

(6) failure to take even basic steps to investigate this claim[.]

Appellant's Brief at 22 (citations omitted). None of these contentions assert that Mid-American made an unfounded refusal to pay policy proceeds, caused an unfounded delay in making payment, or exercised an unfair advantage to pressure the Estate into a settlement. Thus, to determine the existence of a genuine issue of material fact as to whether Mid-American breached its duty of good faith and fair dealing, we need only consider whether Mid-American's conduct constitutes deceiving the insured. See Magwerks, 829 N.E.2d at 975-76.

Shoney's asserts that Mid-American breached its duty of good faith and fair dealing by "contesting the existence and validity of the Policy without any legitimate basis for doing so." Id. In support, Shoney's cites to Jolstad's report. But the pages of Jolstad's report cited by Shoney's do not specifically address that claim. Thus, to the extent Shoney's relies on Jolstad's report regarding Mid-American's "contesting" the existence and validity of the Policy, Shoney's has failed to demonstrate a genuine issue of material fact.

Further, the claim is without merit. An insured seeking coverage under a lost insurance policy "has the burden of proving (1) the fact that he or she was insured under

the lost policy during the period in issue, and (2) the substance of each policy provision essential to the claim for relief, i.e., essential to the particular coverage that the insured claims." PSI Energy, Inc. v. Home Ins. Co., 801 N.E.2d 705, 718 (Ind. Ct. App. 2004), trans. denied. The Estate's attorney had provided Mid-American with only a Policy Declarations page. That Policy Declarations page described a personal Homeowner's Policy with a renewable three-month-term, which had been issued nineteen years earlier. The Estate's claim under the Policy was based on liability arising from a nonadjacent, non-residential parcel of land. Lacking a copy of the entire policy document, Mid-American was justified in wanting to confirm the existence and validity of the nineteen-year-old policy, as well as its specific terms and endorsements, and asked the Estate's assistance in doing so. Shoney's has not shown that Mid-American's desire and attempt to confirm the existence of the Policy created a genuine issue of material fact regarding bad faith conduct.

Shoney's also claims that Mid-American demonstrated bad faith by falsely representing its inability to locate an exemplar of the Policy, citing, again, Jolstad's report as support. But in its January 3, 2008, letter to the Estate, Mid-American quoted language from several exemplar policies, as follows:

> We refer you to the particular language of the HO-3 (7/77) policy and the HO-236 (7/82) and MW-289 (7/82) endorsements that made up part of the coverage indicated on the Declarations page.
>
> In reviewing the complaint and pertinent information it is possible that there is no coverage for the reason that there may have been no bodily injury or property damage as defined by the policy, which occurred during the policy period. The policy states as follows[, quoting policy language.]

> In addition to the policy language outlined above from the HO-3 policy, the MW-289 endorsement modifies Section II of the policy by adding "personal injury" coverage to the coverages available. The applicable portion of the endorsement states the following[, quoting policy language.]
>
> We refer you to the Exclusion section of the policy and direct your attention to the exclusion that may be applicable to this case. . . .
>
> * * *
>
> Some of the exclusions and definitions of the policy are modified by the HO-236 endorsement. These modifications are as follows[, including an exclusion regarding claims arising from incidental business pursuits of the insured.]

Appellant's App. at 1027-30. As shown above, Mid-American explained in its letter that, once the existence of the Estate's policy could be confirmed, some or all of those provisions might apply to exclude coverage. Mid-American cited exemplar policy language in support. Thus, the claim that Mid-American falsely represented its inability to locate policy exemplars is without merit.

Shoney's next contends that Mid-American demonstrated bad faith by "declining to defend without an express disclaimer or any legitimate basis for doing so contrary to industry custom and practice." Appellant's Brief at 22. In support, Shoney's cites to three pages in Jolstad's report. On the first two pages cited, Jolstad asserts that there was no pollution exclusion in the homeowners policy and, therefore, Mid-American had a duty to inform the insured of that and to provide a defense:

> Proper and good faith and fair dealing custom and practices in the industry are to notify the insured (Hedrick Estate) that their [sic] policy does not contain pollution exclusion(s). The next proper and customary step is to provide a defense, if coverage cannot be disclaimed, and inform the insured that Mid-American cannot recover the defense costs because the policy states that the defense costs are at the expense of the insurance company.

Appellant's App. at 556. On the second page cited by Shoney's, Jolstad quotes from the deposition of Thomas J. Baker,[3] where he stated that Mid-American typically defends an insured if it has a doubt about whether it ultimately has to indemnify the insured.

But where it is determined that an insurer has properly found a claim to be excluded from coverage, that insurer's refusal to defend without seeking a declaratory judgment or to defend under a reservation of rights does not constitute bad faith. Microvote Corp. v. GRE Ins. Group, 779 N.E.2d 94, 97 (Ind. Ct. App. 2002), trans. denied. As noted above, this court has held that Mid-American did not owe a duty to defend the Estate because the ownership of the property constituted a business pursuit excluded from coverage under the Homeowner's Policy. Mid-American I, slip op. at *18-*19; Mid-American II, 843 N.E.2d at 552. Mid-American had cited to the business pursuits exclusion in its January 8, 2003, letter to the Estate, wherein Mid-American had given notice that it (1) would not defend, and (2) would continue to investigate coverage issues. Because the Estate's claim was excluded from coverage under the business pursuits exclusion, Mid-American was not obligated to defend the Estate.[4] See Microvote Corp. 779 N.E.2d at 97.

Next Shoney's asserts that it has shown a question of fact as to Mid-American's bad faith because the insurer "prematurely [made] a coverage determination and fail[ed] to communicate that to its insured." Appellant's Brief at 22. In support, Shoney's cites

[3] Mid-American appointed Baker, of Liberty Regional Agency Markets, to be its agent with regard to the Estate's claim.

[4] To the extent Shoney's is arguing that Mid-American improperly refused to defend, regardless of the conditions, that issue was settled in Mid-American I and Mid-American II. The law of the case doctrine and res judicata bar relitigation of that issue. Perry v. Gulf Stream Coach, Inc., 871 N.E.2d 1038, 1048 (Ind. Ct. App. 2007).

again to that part of Jolstad's report in which he addresses the effect of (1) the lack of a pollution exclusion and (2) an internal Mid-American email discussing the preparation of a missing policy reservation of rights letter using designated policy forms. That email is dated December 18, 2002, and states:

> Pat:
>
> Sorry, I have not located an older HO 3 Form to date. Here is a missing policy ROR letter that we can modify to send to the Insured. We can delete 1. as the HO policies did not contain any pollution exclusions. However we can add the [b]usiness pursuits exclusion and coverage only for the insured premises and any vacant land. We are unable to varify [sic] the forms and thus unable to create a policy at this time. We also need to ask them for any additional policy information including the HO 3 07 77 form. The second part of the letter is to obtain information about the spill/leak and the alleged insured's role. Once sent we can do some investigation as to our insured and their [sic] connection to this plot of land. We can also look to other insurance and other companies.
>
> Dave

Appellant's App. at 1047.

Neither the pleadings in opposition to summary judgment nor Jolstad's report shows how the lack of a pollution exclusion is probative of whether Mid-American made and communicated a premature coverage decision. And even considering the email in the light most favorable to Shoney's, this evidence does not support the contention that Mid-American prematurely made a coverage determination. Indeed, the email discusses further investigation of the claim. And the record shows that on January 8, 2003, shortly after the email, Mid-American sent the Estate a reservation of rights letter, detailing possible bars to coverage and exclusions. As such, Shoney's has not demonstrated a question of fact regarding a premature coverage decision.

Shoney's also contends that Mid-American "consciously ignore[ed] the financial exposure faced by its insured as evidenced by its refusal to participate in settlement negotiations or otherwise take steps to protect its insured in ongoing litigation." Appellant's Brief at 22. In support, Shoney's cites to two pages in Jolstad's report, which address Mid-American's failure to participate in settlement negotiations, Jolstad's opinion on Mid-American's duty to defend, and Mid-American's alleged failure to abide by its own "Claims Best Practices" policy. Appellant's App. at 559. But participation in settlement negotiations would constitute defense of the insured. Mid-American did not owe a duty to defend. Mid-American I, slip op. at *18-*19; Mid-American II, 843 N.E.2d at 552. Therefore, as a matter of law, Mid-American's failure to participate in settlement negotiations did not constitute bad faith.

Jolstad also relied on Mid-American's alleged violation of its own Claims Best Practices policy as conduct evidencing bad faith. But Jolstad does not explain what conduct by Mid-American allegedly violated that policy or which part of the policy was violated. Thus, the argument based on alleged violations of the Claims Best Practices policy is waived.

Testimony of Thomas J. Baker

Shoney's also argues that Baker's deposition testimony shows that Mid-American did not "take even basic steps to investigate [the Estate's] claim for over six months . . . ." Appellant's Brief at 23. We note initially that Shoney's occasionally confuses the investigation into the existence of coverage with the investigation of the claim itself. In either case, the record clearly belies that contention. As stated above, the Estate apprised

Mid-American of the complaint in September 2002. Three weeks later, Mid-American corresponded with the Estate to explain that it could not confirm the existence of the Homeowner's Policy upon which the Estate was making a claim. Also in that letter, Mid-American requested information from the Estate to help in determining whether the Homeowner's Policy, if found to exist, would provide coverage for the Estate's claim. And in Mid-American's January 2003 correspondence to the Estate, Mid-American again stated that it could not yet confirm the existence of the Homeowner's Policy and, nevertheless, requested additional information to help determine coverage of the claim. Thus, the record indisputably demonstrates that Mid-American was attempting to investigate the Estate's claim in the five months between its notice of the complaint and the Estate's signing of the settlement agreement.

Unfair Claims Practices Act

Shoney's contends that Mid-American violated Indiana Code Section 27-4-1-4.5 of the Unfair Claims Practices Act ("the Act") and that such violations constitute evidence of bad faith. Again, Shoney's designates Jolstad's report in support. That report states, in relevant part, that Mid-American violated industry custom and practice by:

> (1) Misrepresenting pertinent facts or insurance policy provisions relating to coverage at issue.
>
> (2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.
>
> (4) Failing to pay claim [sic] without conducting a reasonable investigation based on all available information.

> (6) Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear.
>
> (13) Failing to promptly settle claims, where liability has become reasonably clear, under one (1) portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.
>
> (14) Failing to promptly provide a reasonably [sic] explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

Appellant's App. at 557-58 (nonconsecutive numbering original).

In his report, Jolstad's list of alleged violations merely recites language from the Act. Jolstad does not explain what conduct by Mid-American allegedly violated the listed subsections of the Act. The lack of detail in Jolstad's report goes to the weight and credibility of the affidavit. Miami Sand & Gravel, LLC v. Nance, 849 N.E.2d 671, 680 (Ind. Ct. App. 2006). But, more importantly, Jolstad's conclusory opinion that Mid-American violated the provisions of the Act listed does not create a genuine issue of material fact.[5] Id.

Issue Two: Waiver and Estoppel

Shoney's also argues that partial summary judgment in favor of Mid-American was improper on the Estate's waiver and estoppel claims. This court has described estoppel and waiver as follows:

> Estoppel has a meaning distinct from waiver but the terms are often used synonymously with respect to insurance matters. Specifically, here, estoppel "refers to a preclusion from asserting rights by an insurance company or an abatement of rights and privileges of the insurance company

[5] Items 4, 6, and 13 address the failure to pay or settle claims. This court has already determined that Mid-American did not have a duty to defend the Estate. Thus, for that additional reason, Shoney's has not shown a question of material fact as to bad faith by Mid-American as described in items 4, 6, and 13.

> where it would be inequitable to permit the assertion."[15] Conventional jurisprudence defines the elements of equitable estoppel as the misleading of a party entitled to rely on the acts or statements in question and a consequent change of position to his detriment.
>
> [Footnote 15: By comparison, a waiver is the "voluntary or intentional abandonment or relinquishment of a known right, an election not to take advantage of a technical defense in the nature of a forfeiture, raised by an act of the insurance company."]
>
> Indiana adheres to the general rule that the doctrine of estoppel is not available to create or extend the scope of coverage of an insurance contract. The rationale for the rule is that an insurance company should not be forced to pay the loss for which it has not charged a premium. Recently, this court recognized two exceptions to the general rule. The first exists when an insurer misrepresents the extent of coverage to an insured, thereby inducing the insured to purchase coverage which does not in fact cover the disputed risk. . . . Under a second exception, . . . an insurer may be estopped from raising the defense of noncoverage when it assumes the defense of an action on behalf of its insured without a reservation of rights but with knowledge of facts which would have permitted it to deny coverage. . . . Whether an insurer is estopped to disclaim liability under the insurance policy is generally a question for the fact-finder unless the facts giving rise to the estoppel are undisputed and susceptible of only one interpretation.

Employers Ins. v. Recticel Foam Corp., 716 N.E.2d 1015, 1028 (Ind. Ct. App. 1999) (internal citations omitted), trans. denied.

Here, Shoney's does not argue that Mid-American misrepresented the extent of coverage to the Estate so as to induce the Estate into purchasing the policy at issue or that Mid-American assumed the defense of an action on behalf of its insured without a reservation of rights but with knowledge of facts which would have permitted it to deny coverage. Indeed, there is no evidence to support such arguments. Instead, Shoney's asserts that Mid-American should be estopped to deny coverage because "Mid-American's breaches of its covenant of good faith and fair dealing are still actionable." Appellant's Brief at 33. But, again, we hold that the trial court correctly granted

summary judgment to Mid-American on the bad faith claim. Thus, even if we were disposed to extend the law by creating a third exception to the general rule that coverage cannot be created by estoppel where an insurer breached its duty of good faith, such an exception would not apply in this case.

Conclusion

Shoney's has not demonstrated that a question of material fact exists as to whether Mid-American breached its duty of good faith and fair dealing to the Estate. The claims raised by Shoney's in support of its bad faith argument are either waived, contradicted by the record, otherwise unsupported, or incorrect as a matter of law. Because the waiver and estoppel claim is based solely on the allegation of bad faith, Shoney's has not demonstrated the existence of a question of material fact regarding waiver and estoppel. Thus, we conclude that the trial court did not err when it granted Mid-American's motion for partial summary judgment on the bad faith and waiver and estoppel claims.

Affirmed.

BAILEY, J., and CRONE, J., concur.